

USDOL/OALJ Reporter

[\*Keener v. Duke Energy Corp.\*](#), 2003-ERA-12 (ALJ Apr. 19, 2004)

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**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 19 April 2004**

CASE NO.: 2003-ERA-12

In the Matter of:

TERRY W. KEENER  
Complainant

v.

DUKE ENERGY CORPORATION  
Respondent

APPEARANCES:

Julie Fosbinder, Esq.  
For the Complainant

Donn C. Meindertsma, Esq.  
For the Respondent

Before: DANIEL L. LELAND  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This case arises under the Energy Reorganization Act of 1974 ("ERA" or "Act"), as amended, 42 U.S.C. § 5851 *et seq.*, and its implementing regulations at 29 C.F.R. Part 24. The ERA protects employees of Nuclear Regulatory Commission ("NRC") licensees and their contractors and subcontractors from employment discrimination for engaging in protected activity. A formal hearing was held in this case from October 14 to October 17, 2003 in Charlotte, North Carolina. At the hearing, Complainant's exhibits 1-61, Respondent's exhibits 1-73, and Joint Exhibit 1 were admitted into evidence without objection.<sup>1</sup> Complainant and Respondent submitted post-hearing briefs.

## PROCEDURAL HISTORY

Terry W. Keener ("Keener" or "Complainant") initially filed his complaint with the Occupational Safety and Health Administration ("OSHA") on February 27, 2003, alleging violations of Section 211 of the ERA. Specifically, Complainant alleged that Duke Energy Corporation ("Duke" or "Respondent") terminated his employment because he notified a Duke manager of alleged violations of nuclear security regulatory requirements at Duke's McGuire Nuclear Station. OSHA investigated the complaint and on May 12, 2003 determined that "Complainant filed a prima facie complaint but the evidence did not support a merit finding. The Respondent has shown by clear and convincing evidence that the same unfavorable personnel action would have been taken against [Complainant] in the absence of the protected activities." (RX 73). In a letter dated May 21, 2003, Complainant appealed OSHA's finding and requested a formal hearing. The case was referred to the Office of Administrative Law Judges on May 28, 2003.

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[Page 2]

## STIPULATIONS

At the hearing, Complainant and Respondent stipulated that:

1. Duke Energy Corporation, the respondent, is a North Carolina corporation and is headquartered in Charlotte, North Carolina.
2. Among other things, Duke operates three nuclear power plants: the Oconee Nuclear Station, near Seneca, South Carolina; the Catawba Nuclear Station, near Rock Hill, South Carolina; and the McGuire Nuclear Station, near Huntersville, North Carolina.
3. Duke's nuclear organization is supported by personnel at these three nuclear power stations as well as by individuals working in the Nuclear General Office ("NGO" or "general office") located in Charlotte.
4. Terry W. Keener, the complainant, is a resident of North Carolina and resides in Gastonia, North Carolina.
5. Keener was employed by Duke from December 1986 to November 30, 2002. From late 1989 to late 1996, Keener was employed at the McGuire Nuclear Station as the site Security Manager. From November 1996 to the date of his termination, Keener worked in the NGO as a Nuclear Security Specialist in the Nuclear Regulatory and Industry Affairs ("NRIA") organization. Keener's job title in the NRIA was Senior Technical Specialist.

6. The NRIA is an organization within the Nuclear Assessments and Issues Division ("NAID"), which is a division within the NGO in Charlotte.
7. From late October 2001 to the present, Michael T. Cash has been the NRIA Manager.
8. William R. (aka Randy) Cross also worked as a Nuclear Security Specialist with Keener in the NRIA. Keener and Mr. Cross reported to Mr. Cash.
9. In 2002, a new security support position was created in the NRIA. Dana L. Boies was selected for the position. Mr. Boies at the time of his selection was an engineer assigned to the Catawba Nuclear Station.
10. On October 7, 2002, Mr. Cash, the NRIA Manager, notified Mr. Cross and Keener that they were being laid off effective November 30, 2002.
11. The claim asserted by Keener in this case is under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851, as amended. The Department of Labor has jurisdiction over this claim.
12. At all relevant times up to his termination, Keener was an "employee" of Duke.
13. At all relevant times up to Keener's termination, Duke was Keener's "employer" within the meaning of 42 U.S.C. § 5851(a)(1).
14. Keener filed his complaint in this case on February 25, 2003. The complaint alleges that Keener's termination was because of Keener's protected activity.<sup>2</sup>
15. The investigative finding of the Occupational Safety and Health Administration, Deputy Regional Administrator on Keener's complaint, dated May 12, 2003, was that "Complainant filed a prima facie complaint but the evidence did not support a merit finding" and that "the Respondent has shown by clear and convincing evidence that the same unfavorable personnel action would have been taken" absent protected activity.<sup>3</sup>
16. By letter dated May 21, 2003, Keener requested a hearing on the complaint.

(JX 1).

## ISSUES

I. Whether Complainant demonstrated that his protected activity was a contributing factor in Respondent's decision to terminate him.

II. Whether Respondent demonstrated that it would have terminated Complainant in the absence of his protected activity.

## SUMMARY OF EVIDENCE

Complainant was born on February 15, 1956. (TR 28). He graduated from high school and then entered the U.S. Army. (TR 46). Complainant served in the U.S. Army for four years and was honorably discharged in July of 1979. (TR 46-47).

Complainant worked for Respondent from December 1979 to November 30, 2002. (TR 28). Complainant's job titles were: nuclear security officer, security alarm station operator, security shift sergeant, security shift lieutenant, security regulatory compliance supervisor, nuclear security technical staff coordinator, security manager, and nuclear security specialist. (TR 50-52; CX 8). In 1996, Complainant was involuntarily transferred from the McGuire Nuclear Station ("McGuire") to Duke's Nuclear General Office, where he worked as a nuclear security specialist.<sup>4</sup> (TR 171). Complainant's official title was "senior technical specialist" and he was in salary band 4.<sup>5</sup> (TR 52, 54; CX 9<sup>6</sup>). This position entailed assisting Duke's McGuire, Oconee, and Catawba Nuclear Stations with licensing issues, regulatory interpretations, and programmatic support for implementation and interpretation of the NRC's rules and regulations. (TR 28). Complainant testified that over the years he has interacted with NRC to learn its expectations, interacted with engineering, electronics, and maintenance personnel to learn about the security systems and equipment, had training on the Code of Federal Regulations and the NRC requirements, taken basic engineering classes to understand the systems unrelated to security, and taken personnel management courses. (TR 122-125; *see also* CX 39).

Complainant and Randy Cross worked as nuclear security specialists in the general office. (TR 56). Mr. Cross' title was "technical specialist II" and he was one salary band less than Complainant. (TR 57). Complainant and Mr. Cross created a list of the tasks they performed, which is entitled "NRIA – Security Section Products and Services." (TR 55-56; CX 10-11). Complainant was responsible for developing and revising the training and qualification plan, the nuclear security manual, nuclear system directives related to nuclear security, and providing licensing support. (TR 57; CX 10-11).

In August of 2001, Complainant's wife, Priscilla Keener, heard about a security-related incident involving William Evans, the security manager at McGuire, and told Complainant about it shortly thereafter.<sup>7</sup> Mrs. Keener also told Complainant that Mr. Reid was the security officer on-duty during the incident. Complainant told her that he would look into the rumor. (TR 274-275).

On or about September 5, 2001, Complainant approached James Fisicaro, his division manager, to discuss rumors of three alleged security violations at McGuire involving Mr. Evans.<sup>8</sup> (TR 29-30; CX 1, p. 1). First, Complainant told Mr. Fisicaro that as Mr. Evans was being processed through security to enter the protected area of the nuclear station, he set off the metal detector. When Mr. Evans was searched with a hand-held wand, it was determined that there was some type of metal in his shoes. Instead of removing his shoes and putting them through the x-ray machine pursuant to security procedures and the security officer's instructions, Mr. Evans picked up his shoes and other belongings and entered the protected area. (TR 31-32).<sup>9</sup> Later on the same day, Mr. Evans returned to the security area and put his shoes through the x-ray machine. (TR 183). Second, Complainant told Mr. Fisicaro that Mr. Evans was allegedly observed asleep while relieving an officer on compensatory post. (TR 32). Third, Complainant told Mr. Fisicaro that the supervisors and staff personnel that worked under Mr. Evans felt that some of his instructions conflicted with actual security requirements, but that they were reluctant or intimidated to point out the discrepancies to Mr. Evans. (TR 32-33). Complainant did not offer Mr. Fisicaro a specific example of the last rumor, but had learned of Mr. Evans' conflicting instructions from his wife, security officers and other staff at McGuire. (TR 185, 238-239).<sup>10</sup> Complainant considered these rumors to involve security and safety concerns because they dealt with protection of the nuclear site. (TR 245-246). Complainant reported the rumors to Mr. Fisicaro because he felt that they were serious violations of security requirements and protocol, if they were true. (TR 37). He testified that if the rumors were true and had not been properly reported to the NRC, then civil penalties and criminal sanctions could potentially be issued against Duke and/or the individual involved. (TR 43-44). However, Duke's self-identification of a problem could mitigate any civil penalty. (TR 202).

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[Page 4]

Complainant did not report these rumors to Mike Wilder, his immediate supervisor, because Mr. Wilder was his temporary supervisor and he felt that the situation might not be handled appropriately. (TR 34). When Complainant reported these rumors to Mr. Fisicaro, he did not have any firsthand knowledge of the events surrounding the rumors, when the events might have occurred, or whether the rumors were even true. (TR 175, 183). Complainant did not report the rumors to the NRC because at the time he did not have enough information as to whether the rumors were true, and he felt that it was appropriate to give management an opportunity to investigate the rumors. (TR 179, 242). He also did not write a problem investigation process ("PIP") report.<sup>11</sup> (TR 179-180). Complainant testified that when he reported the rumors, Mr. Fisicaro seemed receptive to talking with Complainant and he did not become angry during their conversation. (TR 186-187).

Gary Reid, the security guard who searched Mr. Evans on the day of the Evans shoe incident, testified that Complainant's description of the incident was accurate. (TR 367-372).<sup>12</sup> George Nichols, the security team supervisor at McGuire, was also present at the time of the Evans shoe incident. When Mr. Reid reported to him that Mr. Evans had

entered the secured area without having his shoes searched, he went to Mr. Evans' office and asked him to return to the security area and put his shoes through the x-ray machine. Mr. Evans did not respond to Mr. Nichols, but rather he got up and left his office. (TR 390). Approximately thirty to forty-five minutes later, Mr. Evans returned to the security area, removed his shoes and placed them on the x-ray machine to be processed. (TR 370, 381). Mr. Reid did not write a PIP on the Evans shoe incident because security officers are not allowed to write PIPs. (TR 372). Mr. Nichols did not write a PIP because he did not feel the incident warranted a PIP. Mr. Nichols thought that talking to Mr. Evans and having him x-ray his shoes was the appropriate corrective action to Mr. Reid's concern. (TR 393). The Evans shoe incident was never reported to Bryan Dolan, the safety assurance manager at McGuire. (CX 57, p. 38). He testified that the security supervisor should have notified him of the Evans shoe incident and a PIP report should have been written. (CX 57, pp. 52-53). However, in Mr. Dolan's opinion, the Evans shoe incident is an employee performance problem, rather than a serious security violation, and would warrant some form of discipline. (CX 57, pp. 55-57).

On September 12, 2001, Complainant sent Mr. Fisicaro an e-mail following up on the September 5, 2001 conversation, and approximately twenty minutes later Mr. Fisicaro responded, stating that he would "get with" Complainant. (TR 35-36; CX 1, p. 2). On or about September 19, 2001, Complainant had a conversation with Mr. Fisicaro in the hallway of the general office. Complainant asked Mr. Fisicaro if he had followed up on their previous conversation. Mr. Fisicaro told Complainant that he had spoken with Mr. Dolan, who investigated the allegations and determined that they were just rumors. Mr. Fisicaro told Complainant that if he heard any other rumors, to let him know about them. (TR 36-37; CX 2).<sup>13</sup>

Michael Cash<sup>14</sup> became the nuclear regulatory and industry affairs manager in October of 2001.<sup>15</sup> (TR 418). After he became manager, Mr. Cash met with Mr. Fisicaro to discuss the strengths, weaknesses, and any necessary changes to the functional areas of the NRIA. He then met with each employee to discuss what projects they were working on and how the projects were going. (TR 420-421; RX 2). Mr. Cash met with Complainant on October 18, 2001. They discussed Complainant's work history, his experience, and the tasks he performed at Duke. Complainant gave Mr. Cash a copy of his resume and a copy of the NRIA – Security Section Products and Services list (CX 10) that outlined the tasks performed by Complainant and Mr. Cross. (TR 111, 422, 783-787). They also discussed Complainant's computer skills and that he did not have an engineering degree. (TR 111-112, 787). After the meeting, Complainant felt that Mr. Cash had a good understanding of his position. (TR 820). Mr. Cash felt that Complainant had a positive attitude about his work. (TR 422). Mr. Cash met with Mr. Cross on October 23, 2001. (TR 423). Mr. Cash testified that Complainant and Mr. Cross appeared to perform very similar job functions and tasks, and that they "essentially took the work load and split it up between themselves." (TR 424).

After Mr. Cash became the NRIA manager, Mr. Fisicaro asked him to review the functions being performed in the organization and to make suggestions as to how the functions could be bettered performed. Mr. Cash testified that Mr. Fisicaro felt that the emergency planning function was well-functioning and did not require a lot of attention, but that he had concerns about the security and documentation and records functions. In particular, Mr. Fisicaro wanted Mr. Cash to look at the security support function because he had not gotten a clear answer about the workload of that position when it was previously reviewed. (TR 312-313, 424-426; CX 47-48).<sup>16</sup> Also, Mr. Fisicaro questioned whether the support provided by the security support function was "adding value" to Duke. (TR 568). Mr. Fisicaro did not instruct Mr. Cash to reduce the security support function from two people to one person and he did not criticize Complainant or Mr. Cross. (TR 426-427).<sup>17</sup> Mr. Fisicaro also asked the security BEST group<sup>18</sup> to review the nuclear security support function in October of 2001. (TR 304-305, 567, 721; CX 45; CX 56, pp. 19-20, 24-25; RX 55).

Mr. Cash met with the safety assurance managers at the three nuclear power plants in October or November of 2001 as part of his review of the nuclear security support function because they are considered NRIA's "customers." (TR 435-437). Bill Foster and Dick Sweigart, the safety assurance managers at Oconee and Catawba Nuclear Stations, respectively, advised Mr. Cash that the security support function needed to be forward-looking, in touch with emerging industry issues, and capable of interacting with external groups such as the Nuclear Energy Institute.<sup>19</sup> (TR 437-438, 441). Mr. Foster suggested that the security support function should be similar to Tina Kuhr's position within the emergency planning function because she interfaces with external stakeholders, governmental agencies, and the NEI and she is forward-looking on new changes in the emergency planning area. (TR 439-440). Messrs. Dolan and Sweigart questioned whether two individuals were needed in the security support function and whether the products and services provided by the security support function were appropriate for the nuclear power plants. (TR 440-441).

In November of 2001, the security BEST group informed Mr. Cash, via an e-mail from Terry King,<sup>20</sup> that the security support function could be provided by one individual if some changes were made to the distribution of work. (TR 433-434, 723-725; CX 56, p. 21; RX 4). Mr. Cash testified that this e-mail "was a very strong indicator that one individual may be likely all that was necessary" for that position. (TR 435). Mr. Cash also testified that the terrorist events of September 11, 2001, and the expected regulatory, legislative and engineering changes in its aftermath, were additional factors in his evaluation of the nuclear security support function. (TR 442-443).

As a result of his review of the nuclear security support function, Mr. Cash began to draft the job description for the new security support position in December of 2001 or January of 2002. (TR 445).<sup>21</sup> Mr. Cash consulted with Messrs. King and Foster while he was drafting the job description for the new position because he wanted feedback from the customers. Mr. King, on behalf of the security managers, questioned whether the engineering function of the new position would be redundant because the nuclear power plants had on-site engineers. (TR 445-446, 650-651, 726-727; CX 56, pp. 26-27, 29; CX



58). Mr. Cash explained that he envisioned an individual who could follow emerging technologies in the area of security detection and make recommendations on system upgrades, whereas the on-site engineers merely maintain the equipment. (TR 446-447, 658-659). Otherwise, the security managers agreed with the draft job description. (TR 447-448).

In January of 2002, Elizabeth Rabon, human resources manager of the nuclear general office, became involved in the process of reviewing the nuclear security support function.<sup>22</sup> (TR 324-326; CX 16). Ms. Rabon worked with Mr. Cash to more clearly define the function of the nuclear security support position. (TR 337-339).<sup>23</sup> When Ms. Rabon began working with Mr. Cash, he had already created draft accountabilities and a skills assessment matrix for the new position. Ms. Rabon testified that it was "a little early" in the process for Mr. Cash to draft a skills assessment matrix because the new position had not been finalized.<sup>24</sup> (TR 327, 351; CX 60). Mr. Cash felt that an individual with an engineering background would be valuable in the security support function in light of the potential terrorist threats after September 11, 2001. However, he felt that a security background was still important for the new position. (TR 449-450; 586). Mr. Fisicaro never told Mr. Cash that an engineering background was required for the new position. (TR 307, 449). Also, the position was never limited to engineers. (TR 336).

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[Page 6]

Mr. Cash met with Complainant and Mr. Cross on January 23, 2002.<sup>25</sup> Mr. Cash informed them that he was reviewing the staffing needs and skills and qualifications of the security support function because Mr. Fisicaro and the safety assurance managers had asked him to review the function. (TR 451-452; RX 5). Complainant testified that Mr. Cash informed them that the nuclear security support position was going to be reduced to one person and that the position might be "opened up" so that other people could be considered for the position. (TR 58; CX 12). After the meeting, Complainant and Mr. Cross provided Mr. Cash with feedback regarding the security support function. (TR 59; CX 13; RX 6). Complainant told Mr. Cash that:

one person could probably handle the work load in the short term, if there were some changes made to the position, ... [but] I felt that given we anticipated additional security requirements from the NRC that was going to require some revisions to a lot of our procedures and documents, that given the anticipated work load, I just could not imagine one person successfully doing that the way it was currently set up, and that I was obviously not in favor of the reduction from two primarily for that reason.

(TR 61). Mr. Cash found it interesting that both Complainant and Mr. Cross stated that the position, with some changes, could be performed by one individual. (TR 454, 581).

Mr. Cash next met with Complainant and Mr. Cross on March 20, 2002. In that meeting, Mr. Cash informed Complainant and Mr. Cross that he had determined that one



individual was needed in the security support function<sup>26</sup> and that he had completed the job description for the new position. (TR 62, 459; RX 9). Mr. Cash also told them that Mr. Fisicaro still needed to approve the job description and human resources had to determine the appropriate salary band. (TR 62-63, 459). Mr. Cash testified that he explained that the skill levels had been changed for the new position because of the events of September 11, 2001. However, Complainant does not recall Mr. Cash stating that the position was being changed because of September 11, 2001. (TR 461, 809, 828).<sup>27</sup> Mr. Cash gave a copy of the job description<sup>28</sup> to Complainant and Mr. Cross. Mr. Cross commented that, based on the job description, "you're looking for another Tina Kuhr." (TR 62-63, 212-213, 461-462; CX 14-15). In fact, Mr. Cash had designed the new position to be consistent with Tina Kuhr's position in terms of complexity, difficulty, and similar functions. (TR 460). During the meeting, Mr. Cash also informed Complainant and Mr. Cross that they would be evaluated against the necessary skills associated with the new job description. Mr. Cash recalls that either Complainant or Mr. Cross asked for a copy of the skills assessment matrix, but that human resources told him not to share the matrix with them. (TR 464). Mr. Cash testified that neither Complainant nor Mr. Cross objected to one individual performing the new position. (TR 465-466).

Neither Complainant nor Mr. Cross provided feedback on the new job description. (TR 465-466). Complainant did not provide Mr. Cash with any feedback about the job description because he felt that it was "a fairly reasonable account of what our function had done in the past" and that the accountabilities were an "accurate reflection" of the position. (TR 66). Complainant testified that one accountability that he did not currently perform was acting as a liaison to the industry working groups.<sup>29</sup> (TR 212). Complainant did not have any objections to the minimum or desired qualifications because he felt that he met or exceeded each qualification. (TR 66). After reviewing the job description, Complainant felt that it was basically a description of the position that he was performing, with some enhancements, rather than a new position. (TR 67).

On March 21, 2002, Mr. Cash and Mr. Fisicaro approved the new job description. The approved job description did not contain a Bachelor of Science in Engineering or Physical Sciences as a desired qualification.<sup>30</sup> (TR 467; RX 10). The job description indicates that this is a new position and offers the following explanation as to why a new position is needed:

Due to increased security issues and visibility after September 11, 2001, there is a need for a more focused and effective liaison with industry security groups and governmental agencies in order to maintain compliance as the laws, regulations and standards change. There is a need to quickly understand, analyze, make recommendations, influence, communicate, and implement changes working with industry groups, governmental agencies, management and site security groups.

(RX 10, p. 2; *see also* TR 469).

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Mr. Cash explained the six accountabilities for the new position. Mr. Cash testified that he was looking for someone who could look at emerging regulatory issues that may affect Duke and make policy recommendations to the decision makers, analyze the potential effects of proposed rules and regulations and develop written and oral responses on behalf of Duke, interact with industry groups, and develop function specification documents for security technology upgrades. In addition, Mr. Cash was looking for someone who would maintain a working knowledge of the security equipment and make recommendations as to upgrading that equipment, provide technical and regulatory security support to the three nuclear power plants, provide customer service to the security managers, and maintain a variety of security-related documents. (TR 470-479; RX 10, pp. 3-4). Mr. Cash was looking for an individual who understood security issues, had engineering skills, and could interact with anyone from the executives to the security guards. (TR 479-480). Mr. Cash felt that he might have to look outside of Duke to find an individual with a background in both engineering and security. (TR 469, 591). Mr. Cash testified that the desired qualifications are a way to distinguish those individuals who meet all of the minimum qualifications. (TR 480). Mr. Cash felt that the pool of candidates for the new position should be: engineers, individuals with technical degrees, individuals with a regulatory background and very good writing skills, and security professionals with an extensive regulatory background and writing skills. He stated that Tina Kuhr's position in emergency planning is comparable to the new position. (TR 490; RX 13, p. 7).

In order to demonstrate that he was qualified for the new position, Complainant created a document that compared the list of accountabilities from the job description to the tasks that he performed in 2001 and 2002.<sup>31</sup> (TR 69-71; CX 17). Complainant concluded that "quite a few [of the tasks he performed] were equivalent or related to all of the proposed accountabilities." (TR 71-72). Also, he stated that most of these tasks involved analyzing complex issues. (TR 797). Complainant testified at length as to how various tasks that he performed correlated with the proposed accountabilities. (TR 72-75, 77-90, 94-101, 226-228; CX 18-28). Even though Complainant was not an engineer, he understood the maintenance, testing, and operation of the security system and the applicable regulations. (TR 836-837). Complainant testified that in the last three years of employment at Duke, he was rated as "meets expectations" on his annual performance evaluations, and that he was given "exceeds expectations" on several specific accountabilities. (TR 102, 105, 173-174; CX 29-31). Complainant also received positive feedback from his customers at the nuclear stations. (TR 107, 229; CX 32).

Mr. Cash completed an annual performance evaluation for Complainant on March 26, 2002. His overall rating of Complainant was "meets expectations." (TR 138, 224, 481; CX 40; RX 11). Complainant objected to two portions of the performance evaluation. First, he objected to Mr. Cash's comment that "some of [Complainant's] final work products have required fairly detailed comments by supervision [sic] for a final polished state" because the document Mr. Cash was addressing was one that Mr. Cash drafted rather than Complainant. (TR 140; CX 40; RX 11). Complainant testified that Mr. Cash

told him "we'll change that wording around some, we'll take care of that." (TR 141). However, Mr. Cash testified that he made the comment because a petition for rule making that Complainant drafted required several revisions and the final product was still not ready to be sent out and Complainant had not gotten feedback from the safety assurance managers when working on the petition. (TR 483-484). Mr. Cash felt that the comment was appropriate and he did not agree to remove it from Complainant's review. (TR 482, 484). Complainant also objected to Mr. Cash's notation about a communication problem between Complainant and the security managers. Complainant explained that he had some problems with Mr. Evans when he first started working for the general office, but he felt their relationship had improved. Mr. Cash agreed to strike out that comment from the performance evaluation. (TR 142-143, 482). Complainant asked for a copy of his evaluation on numerous instances, but he did not actually receive a copy of it until November of 2002. (TR 139, 227-228). Mr. Cash explained that it took him some time to get a copy of the performance evaluation because after he had to get a copy from human resources. (TR 487-488). Complainant testified that when he received a copy of the evaluation, the portion about his work product (his first objection) had not been changed. (TR 143). Mr. Fisicaro signed the performance review in September of 2002; he never instructed Mr. Cash to lower Complainant's ratings. (TR 481).<sup>32</sup>

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[Page 8]

A month or two after the March meeting with Mr. Cash, Complainant received an e-mail from Mr. Cash that human resources had completed its review of the new position and that he was awaiting final approval of the salary band from Mr. Fisicaro. (TR 109, 317-319; CX 49). After the job description was approved, Ms. Rabon recommended that Mr. Cash and two other people evaluate the incumbents against the candidate rating table<sup>33</sup> for the new position as a matter of fairness.<sup>34</sup> (TR 491-492; RX 14). In June of 2002, Mr. Cash selected Mr. Thomas, the regulatory compliance manager at McGuire, and Mr. King, the nuclear security manager at Oconee Nuclear Station, as the two other individuals who would evaluate Complainant and Mr. Cross for the new position. (TR 491-492, 498, 687-688; RX 17). In order to evaluate the incumbents, Mr. Cash provided Messrs. King and Thomas with copies of the job description for the new position and the candidate ranking table.<sup>35</sup> (TR 498-499). Under the rating scale, a "1" represented "does not meet and will not likely meet qualifications in three months," a "2" represented "currently meets or will likely meet qualifications in three months," and a "3" represented "currently exceeds qualification." (TR 500-503; RX 17, p. 9). Mr. Cash rated Complainant as 1.20 on minimum qualifications and 1.10 on desired qualifications. Mr. King rated Complainant as 1.35 on minimum qualifications and 1.10 on desired qualifications. Mr. Thomas rated Complainant as 2.00 on minimum qualifications and 1.70 on desired qualifications. (TR 500-501; RX 18, 20, 57, 70).<sup>36</sup> Mr. Cash explained that his rating of Complainant was based on Complainant's experience at Duke and his personal observations of Complainant. (TR 508-509). Mr. Cash gave the same ratings to Complainant and Mr. Cross because, in his opinion, "their skills and abilities seemed to be the same." (TR 662-663). Mr. Thomas' ratings of Complainant and Mr. Cross were based on his experience as their supervisor in the nuclear general office. (TR 673, 676,

688). In Mr. Thomas' opinion, Complainant "could do the job with some time." (TR 691). Mr. King's evaluations of Complainant and Mr. Cross were based on his personal experience working with them.<sup>37</sup> Although Mr. King was not provided with their resumes or performance evaluations, he felt that he had sufficient knowledge of Complainant and Mr. Cross to evaluate them. (TR 728-729, 744-745, 747). Up to this point, Mr. Fisicaro had minimal involvement in the process - his involvement was limited to initiating Mr. Cash's review of the security support function, approving the final job description, and meeting with Mr. Cash on one or two occasions to discuss the critical points. (TR 318, 510).

In an e-mail to Ms. Rabon dated June 24, 2002, Mr. Cash suggested removing "security" from the title of the new position on the JOBS<sup>38</sup> bulletin so that potential candidates would not "tune out" the posting.<sup>39</sup> (TR 510-511; RX 21). Ms. Rabon decided not to change the title because it was not possible to make the title more generic due to "the specifics listed in the actual description." (TR 345, 512; RX 22). Mr. Cash was not attempting to preclude Complainant for the new position when he suggested removing "security" from the job title. (TR 512).

Mr. Cash and Paulette LeCroy, a human resources representative, met with Complainant and Mr. Cross on July 17, 2002. Mr. Cash informed Complainant and Mr. Cross that he had completed skills assessments of them and that he decided to open up the new position for additional candidates. Complainant asked Mr. Cash if that meant that he was not qualified for the position and Mr. Cash responded "no, that was not necessarily the case." (TR 109, 209, 220, 816; CX 34). Mr. Cash encouraged both of them to apply for the new position. Mr. Cash told them that they would both be considered for the new position even if they did not apply, and that they would be given an official notice of layoff and a severance package if they were not selected for the new position. (TR 513-514; RX 24). Mr. Cash testified that at this time he "was skeptical that they would be able to get the job. However, I did not know. They may be the best that we had out there." (TR 514-515; *see also* TR 342-343; CX 51).<sup>40</sup>

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[Page 9]

Thereafter, Complainant found the Job Requisition for the new position on Duke's JOBS bulletin and applied for the position. (TR 110, 113; CX 33, 35). Complainant learned for the first time that a Bachelor of Science in Engineering or Physical Sciences was a desired qualification. (TR 111). Complainant applied for the position even though he did not have an engineering degree because it was not a minimum qualification. (TR 114).

After the JOBS posting closed, Mr. Cash evaluated the seven candidates that applied for the new position. Mr. Cash did not re-assess Complainant and Mr. Cross against the skills and qualifications of the new position, but rather he used his assessment of them from the incumbent review. The candidates were ranked, from one to seven, as follows: Dana Boies, Gary Story, Ana Peterson, Randy Bramlett, Tim Wadsworth, Randy Cross,

and Complainant. (TR 515-517, 547, 628-631; RX 25). Mr. Cash talked with human resources as to whether all of the candidates had to be interviewed because he felt that Complainant and Mr. Cross were "not acceptable" and he did not want to interview them. (TR 634; CX 50). Ms. Rabon told Mr. Cash to interview the incumbents "because of their small number." (TR 339-340; CX 50). Ms. Rabon recommended panel interviews of all of the candidates because there was no clear distinction of skills and qualifications between Complainant and Mr. Cross and the other candidates and panel interviews would save time. The panel was made up of Messrs. Cash, King, and Thomas.<sup>41</sup> (TR 517-518, 635; CX 50).<sup>42</sup> Mr. Cash requested that the candidates provide the panel with samples of the individual's best writing that demonstrates an ability to analyze complex issues and summarize it for a target audience. (TR 115, 518-519; CX 36-38; RX 26-27).

Four candidates were interviewed for the new position: Complainant, Mr. Boies, Mr. Story, and Mr. Wadsworth. (TR 522-523; RX 28-31, 53-54). Mr. Cross withdrew from consideration for the new position before the interviews. (TR 335, 523). During the interviews, the interviewers used an Interview Rating Sheet that was recommended by Mr. Thomas. (TR 521-522, 639; RX 28-31). The panel used a behavioral interviewing technique in which the interviewee is asked open-ended questions relating to a particular skill so that the interviewee draws on his previous experiences to demonstrate the skill. It was Mr. Thomas' idea to use this technique during the interviews. (TR 691-692).

Complainant was interviewed by the panel on August 30, 2002. (TR 209).<sup>43</sup> Complainant testified that the interview was "unusual" because the interviewers asked for a lot of examples of how he had handled a certain situation in the past, and Complainant felt that "I was being measured on how well I could remember an example, not so much what they were." (TR 127). Complainant acknowledged that he had trouble thinking of specific examples for some of the interviewers' questions. He testified that none of the questions addressed the specific requirements of the job, but rather dealt with general skills, such as communication and influencing other people. (TR 127). Overall, Complainant rated his performance in the interview as an "A-." (TR 218). Mr. Cash felt that Complainant did poorly in his interview because on several occasions he struggled for examples to the interviewers' questions and he looked uncomfortable. (TR 524). Mr. Thomas thought that Complainant did not do well in the interview because he struggled to recall past experiences that demonstrated the skills. (TR 692-693). Mr. King felt that Complainant did poorly in his interview because he did not answer the questions clearly or he did not understand the question at all. (TR 732).

Also, Mr. Cash testified that Complainant's writing samples did not demonstrate that he had complex analytical skills. (TR 494-495). Mr. Cash explained that Complainant's bullet point list summarizing proposed legislation (CX 21) does not demonstrate analytic skills because he "would expect to see a short summary under each bullet that discusses why the item has been highlighted, what the relevance is to Duke, what impacts may be to Duke, and what the potential differences may be." (TR 594). Mr. Cash also testified that the other samples did not demonstrate that Complainant has complex analytical skills and only one of the documents revealed some negotiation between customer groups. (TR 596-603, 608-610). Mr. Cash acknowledged that Complainant has a basic knowledge of



industry security working groups. (TR 648). Mr. Cash stated that during the time he managed Complainant, Complainant did not interface with stakeholders, industry groups, trade associations, or legislative bodies. (TR 423).

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[Page 10]

The interviewers felt that Mr. Boies did very well in his interview. Mr. Cash felt that Mr. Boies was well-spoken, provided concrete examples of his skills, and was able to think on his feet. In his opinion, Mr. Boies was "well above the other candidates." (TR 523-524). Mr. Thomas thought that Mr. Boies did very well because he demonstrated a good knowledge of planning and organization skills and brought several exhibits to the interview. (TR 692). Mr. King testified that Mr. Boies was very organized and prepared for the interview, he brought in examples of his work, and he responded to the interviewers' questions in a concise and knowledgeable manner. (TR 731). Mr. Cash also testified that Mr. Story did well in his interview, but felt that he was not as "polished" as Mr. Boies. (TR 524).

After all of the interviews were complete, Mr. Cash asked Messrs. King and Thomas to rank the candidates, with "1" being the top candidate and "5" being the lowest candidate. (TR 525; RX 32).<sup>44</sup> Mr. Cash summarized the panel's rankings of the candidates in an e-mail dated September 13, 2002 to Ms. LeCroy and Ms. Rabon. The panel ranked Messrs. Boies and Story as the top two candidates. Mr. Cash ranked Complainant as fourth and Messrs. King and Thomas ranked Complainant as third. (TR 527, 693-694, 732-733; RX 32-34). On September 16, 2002, Ms. Rabon asked the panel to confer and come up with a unanimous decision on the top candidate because Messrs. Cash and Thomas ranked Mr. Boies as the top candidate whereas Mr. King ranked Mr. Story as the top candidate. (TR 528; RX 35). Also, someone from human resources suggested that Mr. Cash interview Messrs. Boies and Story to assist in the process of choosing the top candidate. *See* RX 43. Mr. Cash spoke to Mr. Boies' supervisor to find out whether Mr. Boies was on a performance improvement plan. Mr. Boies' supervisor told Mr. Cash that Mr. Boies did have some personal issues, but he was not on a performance improvement plan. Also, he thought that Mr. Boies would do a good job in the new position. (TR 536-537, 643-644).<sup>45</sup> After these additional interviews, Mr. Cash felt that Mr. Boies was the top candidate. (TR 539).

On September 16, 2002, Mr. Cash e-mailed Messrs. King and Thomas an interview ranking template to re-evaluate the candidates. (TR 528, 642, 734-735; RX 36, 59-62). The interview ranking template consisted of the five key skills for the new position. (TR 529). The rating scale was: "1" represented that "very strong or strong evidence skill is not present," "2" represented that "some evidence skill is present," and "3" represented that "very strong or strong evidence skill is present." (RX 37, p. 1). Mr. Cash gave Mr. Boies three's for each skill because, between the interview and the written material that he provided, he demonstrated a clear ability to digest, summarize and present information. (TR 530; RX 38). Mr. Cash gave Complainant one's and two's because he stumbled through the interview questions and the written materials that he provided were

"nature, basic, [and]Y they didn't demonstrate the ability to take a large volume of complex material and summarize it for anybody." (TR 531; RX 39). After Messrs. Cash, King and Thomas re-evaluated the candidates, they reached a unanimous decision that Mr. Boies was the top candidate and Mr. Story was the number two candidate. Mr. Cash ranked Complainant as fourth (the last candidate) and Messrs. King and Thomas ranked Complainant as third. (TR 532-534; RX 41).<sup>46</sup> Mr. Cash testified that Mr. Boies was selected for the new position. (TR 534). Mr. Cash testified that Mr. Fisicaro did not participate in the interviews and he did not influence the rankings of the candidates. (TR 532, 735). Mr. Fisicaro approved Mr. Cash's recommendation of Mr. Boies for the new position. (TR 534).

On October 7, 2002, Mr. Cash and Ms. LeCroy notified Complainant that he was not selected for the position and that he was being laid off. (TR 45, 128, 557; CX 7; RX 46). Complainant was also told that Mr. Cross had not been selected either, and that he had left Duke. Mr. Cash asked Complainant to continue working in the general office through the end of October to facilitate the transition of Mr. Boies and to allow him an opportunity to use Duke's resources to search for a new job. (TR 128, 558). Complainant did not object to staying at Duke through the month of November. (TR 232). Complainant testified that he worked with Mr. Boies, an engineer, when the security computers were installed. In Complainant's opinion, he was more knowledgeable than Mr. Boies on nuclear security issues, as he has twenty-three years of nuclear security experience whereas Mr. Boies' security knowledge was limited to the technical aspects of installing the new computers. (TR 166-167, 223-224, 261-262). However, Complainant acknowledged that Mr. Boies was more experienced with engineering type analysis, he had previously interacted with the NRC, and his work-related documents were well-written. (TR 222-223).

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[Page 11]

Complainant accessed the Duke JOBS bulletin "from time to time" searching for a new position within the Duke organization. (TR 129). Complainant testified that shortly after he was notified of his layoff, he told Mr. Cash that he would consider any job in the security group, including a position as a nuclear security officer, in order to stay within the Duke system. Complainant mentioned an individual at the Catawba Nuclear Station who was retiring and that his position in security was similar to Complainant's position. Complainant testified that Mr. Cash told him that he would talk to the security managers and get back to him. (TR 130). Mr. Cash testified that Complainant never mentioned a specific job that he was interested in nor did Complainant ask for assistance in getting a specific job. Mr. Cash testified that Complainant did mention a specific individual who was retiring and to let him know if he heard anything, but Mr. Cash did not know the individual and never heard if that individual was retiring. (TR 558-559).<sup>47</sup> Complainant testified that in November of 2002, Mr. Cash told him that he had talked to the security managers, and that "a transfer of that sort was not going to be possible." (TR 130). In contrast, Mr. Cash testified that he never told Complainant that he could not be transferred to a nuclear power station. (TR 559). Complainant did not apply for a specific



security officer position with Duke. (TR 234). Complainant's official last day with Duke was November 30, 2002. (TR 45).

Mr. Cash testified that during the entire process of reviewing the security support function and creating the new position, he did not know that Complainant reported rumors of security violations to Mr. Fisicaro in September of 2001. (TR 535). Similarly, Messrs. King and Thomas did not know about the rumors when they were participating in the interview process for the new position. (TR 697, 737). Mr. Thomas testified that it would be out of character for Mr. Fisicaro to discriminate against an employee who reported a safety violation because Mr. Fisicaro says that "we need to cultivate an environment in which employees feel safe to raise safety concerns." (TR 716).

Mr. Cash testified that Mr. Boies is the only individual performing the security support function in the general office. (TR 656). Mr. Cash testified that Mr. Boies:

has spent an extensive amount of time in Washington, D.C. dealing with the Nuclear Energy Institute on various emerging issues that continue to come out in the nuclear security area. What he does in that regard is he goes to the NEI meetings. He represents Duke positions. He also collects information associated with NEI stances, as well as other potential licensee stances on issues. He will bring back some reviews or analyses, if you might, on what those positions are. He will make management, various levels of management... aware of what these emerging positions are to get input to help formulate policy positions from a Duke perspective on those issues, as well as... provide the security managers information from which they can develop and work with us to develop actual documents that might be resulting for any actual changes that flow from these changes.

(TR 548-549). Mr. Cash testified that Mr. Boies has attended all of the NEI meetings associated with emerging changes and regulatory requirements and he has analyzed and made recommendations associated with these requirements. (TR 549). Mr. Cash testified that Mr. Boies' work is different from Complainant and Mr. Cross' work because Complainant and Mr. Cross were "primarily maintaining documents, receiving requested changes from the stations and processing changes." (TR 550). Mr. Cash also testified that Complainant needed more instruction than he currently gives to Mr. Boies. (TR 661).

Complainant testified that during the time that Mr. Cash was his manager, he changed or suggested changes to Complainant's position in several ways. One part of Complainant's position was to review information from the NRC and the media for articles discussing security and he would send "items of interest" e-mails to the security managers and Mr. Cash. Mr. Cash suggested that Complainant assess the value of this task, as Mr. Cash had reviewed the same articles from other sources and Complainant was not providing a summary of the articles. (TR 143-144, 554-556). Complainant contacted the security managers, who told Complainant that the e-mails were useful, so Complainant just removed Mr. Cash's name from the e-mail distribution list. (TR 145).

Also, Mr. Cash told Complainant and Mr. Cross not to regularly attend the security BEST meetings, but that they could attend the meeting if they had a specific issue that needed to be addressed. (TR 146-147). Mr. Fisicaro explained that Complainant was involved with the security BEST group in that the group would define things that they wanted the general office to work on, and the general office would work on those things. (TR 303; *see also* 686). Mr. Cash asked Complainant and Mr. Cross not to participate in the security BEST group meetings because he wanted to be able to discuss the progress of the selection process for the new position with the security

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[Page 12]

managers and he felt that it would be inappropriate for Complainant and Mr. Cross to be privy to these conversations. Also, Mr. Cash was attending the meetings and he could bring back relevant information to Complainant and Mr. Cross. (TR 553-554). Finally, Mr. Cash told Complainant and Mr. Cross not to regularly participate in the security managers' weekly telephone conference call, but that they could participate in the call if they had a specific issue to discuss with the security managers. (TR 147-148).

Complainant testified that Mr. Cash made these changes to his position in the early part of 2002. (TR 149). Complainant testified that these changes affected his ability to do his job because he was "out of the loop" on the current issues that the security managers were discussing. (TR 148). However, Complainant also testified that his interactions with Mr. Cash were "professional," and he never felt that Mr. Cash was angry with him. (TR 207).

After he was laid off, Complainant investigated the events surrounding his termination. Complainant accessed the electronic database of reported PIP events and discovered that a PIP report had not been created for the Evans shoe incident. Complainant also searched the safeguard log entries and discovered that there was no entry for the Evans shoe incident. (TR 160-161; CX 43). Complainant contacted Mr. Reid, who told him that no one had asked him about the Evans shoe incident as part of an investigation. (TR 134). Complainant also contacted Roxanne Norcutt and Chad Blackwelder, former security officers at McGuire, about the rumor of Mr. Evans sleeping on compensatory post. Ms. Norcutt and Mr. Blackwelder had heard the rumor, but neither had seen Mr. Evans sleeping on compensatory post. (TR 162-163). During his exit interview, Complainant told the human resources representative that he felt concerns he reported to management had not been adequately resolved, but he did not disclose the specifics of the rumors to her. (TR 193, 244-245). Complainant feels that if Mr. Fisicaro had not actually investigated the rumors that he reported in September of 2001, then perhaps his conversations with Mr. Fisicaro are related to his termination. (TR 133-134). Complainant believes that Mr. Fisicaro did not follow up on the rumors that he reported in order to protect Duke from the potential repercussions. (TR 164).

Complainant also feels that his termination was related to his conversations with Mr. Fisicaro because shortly after he was notified of his layoff, he received a document in his mail distribution box indicating that he was the lowest ranked of the seven candidates. Complainant was suspicious because two of the people ranked higher than him were

people that he had hired and trained. Also, he was suspicious because his and Mr. Cross' rankings were disproportionately lower than the rankings of the other candidates. (TR 135-136). Complainant never told Mr. Cash, Mr. Fisicaro, or human resources that he believed the new position was being created as a result of his conversations with Mr. Fisicaro. (TR 216, 764). However, he did tell Daniel Causey,<sup>48</sup> a security officer at McGuire, Ms. Cox, and Teresa Neel, Mr. Cash's administrative assistant, in casual conversations that he felt Mr. Cash was reviewing his position because of the rumors he reported to Mr. Fisicaro. (TR 243-244, 264, 401-402). On February 23, 2003, Complainant filed a complaint with the NRC alleging discrimination and reporting the allegations of potential wrongdoing. (TR 159-160).

Complainant's base salary at Duke without incentives or benefits was \$6,497.00 per month. In the year 2001, the last full year that he was employed with Duke, Complainant earned \$81,394.45, reflecting his base pay plus a lump sum raise. (TR 149-150, 153-154; CX 41). Complainant also had medical and dental insurance and a matching retirement account, to which Complainant contributed twelve percent of his income and Duke matched six percent of his contribution. (TR 150-151). Complainant has not worked since he was terminated from Duke. Complainant has talked with employment counselors, searched for a job on the Internet (including Duke's web site), and sent out resumes, but has not found a new job. Complainant testified that he recently had a job interview, but he was not selected for that position. Complainant testified that he has not turned down any job offers. (TR 155-156). Since he was terminated from Duke, Complainant has been depressed, stressed,<sup>49</sup> irritable, and unable to sleep more than three or four hours. (TR 158-159, 275-277). Otherwise, Complainant has been in good health. (TR 235, 284).

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[Page 13]

## DISCUSSION

As this case has been fully tried on the merits, the relevant inquiry is whether the complainant has prevailed on the ultimate question of liability. Thus, it must be determined whether the complainant has proven, by a preponderance of the evidence, that he engaged in protected activity, that the respondent knew about the protected activity and took adverse action against the complainant, and that the complainant's protected activity was a contributing factor in the adverse action that was taken. 42 U.S.C. § 5851(b)(3)(C); *see, e.g., Kester v. Carolina Power & Light Co.*, 2000-ERA-31 (ARB Sept. 30, 2003); *Paynes v. Gulf States Utilities Co.*, 1993-ERA-47 (ARB Aug. 31, 1999); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y, Feb. 15, 1995), *aff'd Carroll v. U.S. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996). If the complainant meets his burden, then the respondent must demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity to avoid liability. § 5851(b)(3)(D); *see also Kester, supra*.

### Protected Activity

A complainant's acts "must implicate safety definitively and specifically" in order to constitute protected activity. *American Nuclear Resources v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998)(citing *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)). An internal complaint is a complaint lodged with a supervisor of the company itself. An external complaint is a complaint lodged with an outside agency, such as the NRC. *Kahn v. Sec'y of Labor*, 64 F.3d 271, n.3 (7th Cir. 1995). The 1992 amendments to the ERA specifically provide that internal complaints are protected activity under the Act. § 5851(a)(1)(A); *Reynolds v. Northeast Nuclear Energy Co.*, 1994-ERA-47 (ARB Mar. 31, 1997).

In September of 2001, Complainant reported rumors of three safety violations to Mr. Fisicaro. Complainant reported a detailed description of the Evans shoe incident to Mr. Fisicaro, which included the name of the security officer involved. (TR 31-32; CX 1). Complainant's account of the Evans shoe incident is consistent with Messrs. Reid and Nichols' accounts of the incident, who were the security officer and security supervisor, respectively, on duty at the time of the Evans shoe incident. (TR 367-369, 390). Complainant testified that the Evans shoe incident violated the NRC requirements to search individuals before they enter the secured area and to report security violations within the prescribed period. (TR 40-41). Messrs. Thomas and Dolan also testified that if the Evans shoe incident occurred, then the NRC's security requirements were violated. (TR 757-758; CX 57, pp. 51-52). I find that Complainant's report of the Evans shoe incident is "definite and specific" enough to implicate safety. In addition, Complainant's conversation with Mr. Fisicaro is an "internal complaint" and is specifically covered under § 5851(a)(1)(A). Therefore, I find that Complainant's reporting of the Evans shoe incident to Mr. Fisicaro constitutes protected activity. In contrast, I find that the other two rumors that Complainant reported to Mr. Fisicaro do not constitute protected activity because they were too general to implicate safety.

#### Respondent's Knowledge

In order to establish that the respondent knew of the complainant's protected activity, the evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity. *Merriweather v. Tennessee Valley Auth.*, 1991-ERA-55 (Sec'y, Feb. 4, 1994); *Bartlik v. Tennessee Valley Auth.*, 1988-ERA-15 (Sec'y, Apr. 7, 1993), *aff'd* 73 F.3d 100 (6th Cir. 1996). If the respondent's employee who terminated the complainant was unaware of the protected activity, but another employee with knowledge of the protected activity "contributed heavily" to the decision to terminate the complainant's employment, then his knowledge of the protected activity can be imputed to the respondent. *Thompson v. Tennessee Valley Auth.*, 1989-ERA-14 (Sec'y, July 19, 1993). The complainant can prove that the respondent had knowledge of the protected activity by either direct or circumstantial evidence. *Bartlik, supra*.

Mr. Fisicaro is the only Duke employee who knew about Complainant's protected activity. Messrs. Cash, King, and Thomas and Ms. Rabon, who were involved in the process of creating the new position and selecting Mr. Boies for the new position, credibly testified that they did not know about the alleged safety violations that Complainant reported to Mr. Fisicaro. (TR 535, 697, 737, 761). Messrs. Cash and Fisicaro testified that Mr. Fisicaro's role in reviewing the nuclear security support function position, creating the new position, and selecting Mr. Boies for the new position was limited. Mr. Fisicaro asked Mr. Cash to review the nuclear security support position, he reviewed and approved the list of accountabilities, qualifications, and salary banding for the new position, and he approved the selection of Mr. Boies for the new position. (TR 312, 317-319, 424-426, 510, 587). However, he was not involved in drafting the job accountabilities or interviewing the candidates for the new position. (TR 307, 518, 582). The pivotal question is whether Mr. Fisicaro's involvement in Complainant's termination is of a sufficient degree to impute his knowledge to Duke. While Mr. Fisicaro played a limited role in crafting the job description and selecting Mr. Boies for the new position, he had the ultimate authority, as the division manager of the NAID, to approve or disapprove the job description, salary banding, and the selection of Mr. Boies for the new position. At any point in the process, Mr. Fisicaro could have changed the direction of the new position (e.g., reduced the number of employees from two to one without changing the position's responsibilities, removed the engineering background from the list of accountabilities and qualifications, limited the potential candidates to the incumbents, etc.). Therefore, I find that Mr. Fisicaro's involvement in the process was sufficient enough that his knowledge of Complainant's protected activity can be imputed to Duke.

In his brief, Complainant argues that there is strong circumstantial evidence that Mr. Cash had knowledge of Complainant's protected activity.<sup>50</sup> Complainant argues that Mr. Thomas' comment that "you do know that Mr. Cash is not the one driving this" and Mr. Cash's negative comment about his ability to communicate with the security managers during his performance evaluation in March of 2002 demonstrate that Mr. Cash was aware of his protected activity. First, Mr. Thomas denied making the comment that Mr. Cash was not the person driving the review of the nuclear security support position. (TR 713-714). Even if the statement is true, it only demonstrates that Mr. Fisicaro was the individual "driving" the review; it does not demonstrate that Mr. Cash was aware of Complainant's protected activity. Second, Mr. Cash's written comment in Complainant's performance evaluation was as follows:

There may be some communication issues with [Complainant] and one or more of the security managers. During the recent order review [Complainant] and Randy met with the security managers to review the sites responses. [Complainant] and Randy indicated that the security managers "did not provide" a copy of the actual responses during the review session. As an area for improvement [Complainant] should look to see if these working relationships are what they should be.

(RX 11, p. 3). Complainant testified that he told Mr. Cash that he had some problems with Mr. Evans when he began working in the security support function, but in his

opinion their relationship had improved. (TR 142-143). Mr. Cash did not testify as to the meaning of the above comment, but he did remove it from Complainant's performance evaluation. (TR 482-483). Mr. Cash's written comment appears to target Complainant's poor communication skills when getting feedback from the security managers (because he did not get written feedback from the security managers on an order review project that Complainant was working on); it does not suggest that Complainant had a personal problem with any of the security managers. Moreover, as stated before, Mr. Cash credibly testified that he did not know of the rumors of the alleged security violations that Complainant reported to Mr. Fisicaro during the process of reviewing the security support function. Therefore, I find that the evidence does not demonstrate that Mr. Cash knew about Complainant's protected activity.

### Adverse Action

An adverse action is "simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). A complainant's discharge, or a change in his compensation, terms, conditions, or privileges of employment constitute an adverse action. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *see also* 29 C.F.R. §24.2(b).

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[Page 15]

Complainant received his Notice of Layoff on October 7, 2002. (TR 45, 128, 557; JX 1, ¶ 10). I find that Complainant's termination constitutes an adverse action.

### Contributory Factor

The 1992 amendments to the ERA included the adoption of the "'contributing factor' standard 'in order to facilitate relief for employees who have been retaliated against for exercising their [whistleblower rights].' Congress may have been recalling that in 1989 it enacted the Whistleblower Protection Act. The WPA requires a complainant to prove that a protected disclosure was a 'contributing factor in the personnel action...'" *Kester*, slip op. at 7, n.15 (citations omitted). In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

The words "a contributing factor" ... mean any factor which, alone or in connection with other factors, tends to affect the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

2 F.3d at 1140 (citations omitted). A complainant does not need to have any specific knowledge that the respondent's officials had an intent to discriminate against the complainant; ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10, n.7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). When a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all of the evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996).

Complainant and Respondent's briefs analyze this case under the burden shifting analysis. As previously stated, once a case has been tried on the merits, the issue becomes whether the complainant has proven by a preponderance of the evidence that the respondent discriminated against him. Therefore, I will consider the parties' arguments of pretext (or lack thereof) in the context of whether Complainant has established that his protected activity was a contributing factor in the adverse action taken by Respondent.

#### 1. Mr. Fisicaro's involvement in the process

Complainant argues that Mr. Fisicaro's involvement throughout the process of creating the new position coupled with his knowledge of Complainant's protected activity raises an inference that Complainant's termination was due to his reporting of the alleged safety violations. Respondent argues that Mr. Fisicaro had no animosity towards Complainant and there is no evidence that Mr. Fisicaro treated Complainant differently, or sought to have him terminated, after Complainant reported the safety rumors, and thus there is no evidence that Complainant was terminated because of his protected activity. Mr. Fisicaro was involved in the process to review the nuclear security support function (and subsequently to create and hire for the new position) because he was a divisional manager and as such was involved in the reorganization of a section of his division. (TR 324-325). However, Mr. Cash was primarily in charge of the review of the nuclear security support function and the creation of the new position and Mr. Fisicaro's involvement was limited to approving the decisions (i.e., approval of the job description, salary banding, individual selected for the new position, etc.). (TR 317-319, 467, 510, 534). The fact that Mr. Fisicaro had final approval of decisions made within his division does not demonstrate that he affected the outcome of the process. The evidence demonstrates that Messrs. Cash, King, and Thomas made the ultimate (and unanimous) decision to select Mr. Boies for the new position, which was then approved by Mr. Fisicaro. (TR 534, 696, 735-737). Further, there is no evidence that Mr. Fisicaro attempted to influence the individuals involved in the process. Messrs. Cash, King, and Thomas and Ms. Rabon testified that they were unaware of the rumors that Complainant reported to Mr. Fisicaro throughout their involvement in the process. (TR 535, 697, 737, 761). Messrs. Cash and King testified that Mr. Fisicaro never criticized Complainant and he never stated that he wanted Complainant removed from the nuclear security support function. (TR 427, 724-725). Also, Messrs. Cash, King, and Thomas testified that Mr. Fisicaro did not influence their final rankings of the candidates. (TR 532, 694, 734, 736). Finally, Complainant



testified that Mr. Fisicaro was professional when he reported the security rumors to him and there is no evidence that Mr. Fisicaro spoke poorly of Complainant after he engaged in protected activity. (TR 186-188, 427, 724-725). Therefore, I find that Mr. Fisicaro's involvement in the process does not demonstrate that Complainant's protected activity was a contributory factor to his termination.

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[Page 16]

## 2. New position "virtually the same" as the old position

Complainant argues that the new position was "virtually the same" as the old position and that it was only categorized as a new position to conceal the real reason for Complainant's termination.<sup>51</sup> Respondent argues that the new position included accountabilities that were not performed by the incumbents, and thus it constituted a new position. Complainant offered testimonial and documentary evidence that he performed all of the accountabilities of the "new" position in the "old" position. (TR 69-75, 77-90, 94-101, 226-228; CX 18-208). In fact, when offered an opportunity to provide feedback to Mr. Cash regarding the job description, Complainant declined because "it seem[ed] like a fairly reasonable account of what our function had done in the past." (TR 66). However, Complainant acknowledged that the "old" position did not require him to interact with industry working groups, legislative bodies, or Duke management (accountability two) and he did not provide technical support to the nuclear power plants in the "old" position because he did not have an engineering background (accountability five). (TR 212, 817-818, 825-826). Mr. Cash explained that the "old" position involved "primarily maintaining documents, receiving requested changes from the stations and processing changes" (TR 550), whereas the "new" position required rapid absorption and summarization of regulatory information that would then be presented to Duke's executive decision makers. (TR 469). Also, when Mr. Cross first read the job description for the new position, he commented that "you're looking for another Tina Kuhr" and Mr. Cash noted that he specifically designed the new position after Tina Kuhr's position in emergency planning. (TR 460-462). I find that the "new" position was different than the "old" position and thus Duke's decision to open up the position to other candidates was not discriminatory.

## 3. Mr. Cash ignored feedback from the security managers

Complainant argues that Mr. Cash ignored the security managers' feedback regarding the accountability involving engineering skills, and instead had a job description approved that overlapped the duties of on-site engineers. Respondent argues that Complainant is simply trying to get the Court to second-guess Duke's business decision about the necessary skills for the new position, which is inappropriate. *See EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992). The fifth accountability of the new position deals with providing technical and regulatory support to the three nuclear sites. (CX 15; RX 10). Mr. King testified that the security managers felt that this accountability was similar to a function performed by the on-site systems engineer at each of the nuclear

power plants. (TR 726-727; CX 58). Mr. Cash explained that the "ideal" person would understand the engineering aspects of the security system and be able to quickly facilitate changes to the security system. (TR 475-476). He distinguished this position from the on-site engineers by stating that the individual in the new position would follow emerging security technologies and make upgrade recommendations, rather than maintain the security systems. (TR 446-447, 658-659). It is Complainant's opinion that the new position did not require an engineering degree because the job description did not include mathematical engineering calculations. (TR 835). However, it is not the job of this Court to determine whether or not an engineer-related accountability should have been made a part of this new position. Contrary to Complainant's assertion, Mr. Cash did consider the security managers' feedback, but determined that the accountability was different enough from the on-site engineers that the two positions would not overlap. Further, Mr. Cash testified that he specifically designed the new position to be similar to Tina Kuhr's position, which had an engineering aspect. (TR 490). I find that Duke made a reasonable business judgment to include an engineering aspect to the new position and Complainant has failed to demonstrate that its decision was discriminatory.

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[Page 17]

#### 4. Complainant was better qualified than Mr. Boies for the new position

Complainant argues that Mr. Boies was not as qualified as him for the new position because Mr. Boies did not have a security background. Complainant also argues that Mr. Boies should not have been selected for the new position because he was on a performance improvement plan. In contrast, Respondent argues that Complainant was less qualified than Mr. Boies for the new position, as demonstrated by his lack of an engineering background and poor performance in the interview, and that Mr. Boies was properly considered for the new position because he was not on a performance improvement plan. First, the evidence demonstrates that Mr. Boies was properly considered for the new position because he was not on a performance improvement plan at the time of the interview or at the time of his selection for the new position. (TR 341, 643-644). Second, Complainant presented lengthy testimony to support his assertion that he was qualified for the new position and Respondent presented lengthy testimony to support its assertion that Complainant was not qualified for the new position. (TR 69-71, 72-75, 77-90, 94-101, 226-228, 423, 494-495, 594, 596-603, 608-610; CX 17-28). Messrs. Cash, King, and Thomas testified that Mr. Boies' interview went "very well" and Complainant did poorly in his interview. (TR 523-524, 692-693, 731-732). Mr. Boies had an engineering background and had nuclear security experience, whereas Complainant only had experience in nuclear security, albeit extensive. (TR 166-167, 221-224, 261-262). Further, Mr. Cash stated that Complainant's experience with industry groups was limited and his writing samples did not demonstrate complex analytical skills. (TR 423, 494-495, 596-603). Messrs. Cash, King, and Thomas unanimously agreed that Mr. Boies was the top candidate for the new position. (RX 41-43, 71). In contrast, Mr. Thomas testified that Complainant "*could* perform the [new position] with some time." (TR 691)(emphasis added). The evidence demonstrates that Complainant might have been

able to perform the new position, but that Mr. Boies was the most qualified of the candidates for the new position. The mere fact that Complainant believes he was qualified for the position does not show that his non-selection for the position was discriminatory. Therefore, I find that Complainant has not presented evidence that the interviewers' selection of Mr. Boies for the new position was not a reasonable business decision.

## 5. Selection process

Complainant argues that there were several "problems" with the selection process, which includes a change in the job qualifications at the last minute, the use of panel interviews, the rating of Mr. Cross on the interview evaluation form even though he was not interviewed, and the interviewers' rating of the candidates after they had been ranked. Respondent argues that the use of the panel interviews demonstrates that Duke did not discriminate against Complainant because Messrs. King and Thomas, who were on the panel, were not supervised by Mr. Fisicaro. Also, Respondent argues that it presented a reasonable explanation as to why the interview evaluation form was used for Mr. Cross (Ms. Rabon had asked the interviewers to evaluate Mr. Cross), and the use of the interview evaluation form for Mr. Cross did not affect Complainant's ranking because he did not "lose out" to Mr. Cross.

First, Complainant argues that the job qualifications were changed at the last minute because a Bachelor of Science in Engineering or Physical Sciences was added as a desired qualification in July of 2002. The job description was first approved by Messrs. Cash and Fisicaro on March 21, 2002 and did not list an engineering degree as a desired qualification. (TR 467; RX 10). The job description was subsequently changed in June of 2002 to include an engineering degree as a desired qualification because the position was categorized as a salary band 4. (TR 496, 499). The new position was posted on the JOBS bulletin on July 16, 2002, and the Job Requisition Form included an engineering degree as a desired qualification. (CX 33; RX 51). Complainant credibly testified that he did not learn that an engineering degree was a desired qualification until he applied for the position. (TR 111). Duke has presented a reasonable explanation as to why the job description was changed and Complainant has not presented any evidence as to how the change affected his non-selection for the position. If an engineering degree was a desired qualification when he received a copy of the job description in March of 2002, or if Mr. Cash had given him a copy of the amended job description in June of 2002, Complainant would not have been able to obtain an engineering degree in the months before the interviews for the new position. Moreover, the fact that an engineering degree was a desired qualification did not make Complainant unqualified for the position because it was not a minimum qualification for the position.

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[Page 18]

Second, Complainant argues that the use of panel interviews was "unusual" and that he had never heard of panel interviews being used at Duke. Typically the hiring manager is

the only person involved in the process. (TR 126). While panel interviews may be atypical at Duke, their use does not raise an inference of discrimination. The panel of interviewers consisted of Messrs. Cash, King, and Thomas. Messrs. King and Thomas were employed outside of the nuclear general office, and were not supervised by Mr. Cash or Mr. Fiscaro. (TR 673, 718). Mr. Thomas had previously supervised Complainant when he worked as the NRIA manager, and thus was familiar with Complainant's work experience. (TR 676). Similarly, Mr. King, as security manager at Oconee Nuclear Station, was considered a "customer" of the nuclear security support function, and thus was familiar with Complainant's work. (TR 745, 747). Moreover, Messrs. King and Thomas rated Complainant higher than Mr. Cash, and Mr. Thomas even rated Complainant on his work experience and interview performance, as he felt that Complainant "could have done better" in the interview. (TR 695-696; RX 41-42). Therefore, the presence of Messrs. King and Thomas on the panel appears to have benefited Complainant because he was ranked higher because of their ratings.

Third, Complainant contests the interviewers' evaluation of Mr. Cross given the fact that he was not interviewed. Ms. Rabon credibly testified that she asked the panel to evaluate Mr. Cross, even though he was not interviewed, because he was an incumbent and the interviewers were familiar with his work. (TR 349). While Ms. Rabon did not intend for the interviewers to use the Interview Rating Sheet to document their evaluations of Mr. Cross (TR 763), its use did not affect Complainant's evaluation because the interviewers rated Mr. Cross lower than they rated Complainant and Mr. Cross was not selected for the position. (RX 34, 41).

Finally, Complainant points out that the interviewers "rated" the candidates after they had "ranked" the candidates, implying that the evaluations were manipulated to satisfy an intended result (i.e., the non-selection of Complainant for the new position). After the interviews were complete, Messrs. Cash, King, and Thomas ranked the candidates. *See* RX 32-34. In his instructions, Mr. Cash asked the interviewers to rank the candidates from one to five (with one being the top candidate) and to "work on" documenting their selections. (RX 32). When the interviewers reported their rankings, there was no consensus as to the top candidate (Messrs. Cash and Thomas ranked Mr. Boies as the top candidate whereas Mr. King ranked Mr. Story as the top candidate), and human resources asked the interviewers to confer and reach a unanimous decision as to the top candidate. (RX 35). The interviewers then completed an interview ranking template for each candidate and they unanimously selected Mr. Boies as the top candidate and Mr. Story as the second candidate. (TR 528, 642, 734-735; RX 36-42, 58-62, 71). The interviewers' use of the interview ranking templates was not the first time that they were evaluating the candidates, but rather was a mechanism to ensure that the interviewers used the same criteria in ranking the candidates. *See* RX 32, p. 2 (Mr. Cash stated that "I prefer to let you each choose your own format for documenting your opinions to maximize the independence" on September 9, 2002.). Moreover, the interviewers' "ratings" of the candidates (via the interview ranking templates) were consistent with their previous "rankings" of the candidates, with the exception of Mr. Boies being selected as the top candidate by all three interviewers, thus demonstrating that the ratings merely supplemented their prior rankings of the candidates.

Complainant presented several arguments as to how the selection process for the new position was different than the normal selection process at Duke. However, the alleged "problems" with the selection process do not demonstrate that Complainant's protected activity was a contributing factor to his termination. Mr. Cash did add an engineering degree as a desired qualification to the job description, but it was added before the position was posted on the JOBS bulletin and Complainant had knowledge of the qualification when he applied for the position. The use of panel interviews actually helped Complainant because Messrs. King and Thomas ranked Complainant higher than Mr. Cash did, highlighting that Mr. Cash would not have selected Complainant had the "typical" interview process been used. The interviewers' evaluations of Mr. Cross on the Interview Rating Sheet did not impact Complainant's ratings or his non-selection because Mr. Cross was rated lower than Complainant. Finally, the fact that the interviewers "rated" the candidates after they "ranked" the candidates did not affect Complainant's standing as a candidate or the interviewers' opinions that Messrs. Boies and Story were more qualified than Complainant for the new position. Based on the foregoing, I find that the alleged problems with the selection process did not affect the outcome of the decision to select Mr. Boies for the new position and to terminate Complainant.

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[Page 19]

6. Respondent did not consider Complainant for another position at Duke

Complainant argues that Respondent did not make an effort to retain him in another position at Duke, even though he informed Mr. Cash that he would consider any security-related position to remain a Duke employee. Respondent argues that it was under no duty to retain Complainant in another position and that this claim cannot be considered a failure to hire claim because Complainant did not apply for another position with Duke. After the notice of layoff, Complainant mentioned to Mr. Cash that someone in security was retiring at Catawba Nuclear Station and to let Complainant know if he heard anything about that position. Mr. Cash did not know the individual and never heard about someone retiring at Catawba. (TR 130, 558-559). Mr. Byers testified that he hired approximately eleven security officers at the end of 2002, and that Complainant would have been qualified to work as a security officer at Catawba. (CX 56, pp. 36-38). In fact, Complainant had previously worked as a security officer for Duke. (TR 50; CX 8). However, Complainant did not apply for a specific security officer position at Duke. (TR 234). Complainant has not presented any evidence that he applied and was qualified for a specific position within Duke, and thus he cannot assert that Duke's failure to retain him in another position was discriminatory. *See Acord v. Alyseska Pipeline Service Co.*, 1995-TSC-4, slip op. at 5-6 (ARB June 30, 1997), *aff'd* 166 F.3d 1217 (9th Cir. 1999).

7. Respondent's perception of Complainant's skills and qualifications declined after he engaged in protected activity

Complainant argues that after he reported the alleged security violations to Mr. Fisicaro, Messrs. Cash and Fisicaro's perceptions of him declined. Respondent argues

that Messrs. Cash and Fisicaro's perceptions of Complainant did not decline, as demonstrated by the rating of "meets expectations" on the 2001 performance evaluation. First, Complainant argues that after his protected activity, Mr. Fisicaro questioned the "value" of the nuclear security support function when he requested Mr. Cash review the position. (TR 568). Mr. Fisicaro asked Mr. Cash and the security BEST group to review the nuclear security support function in October of 2001 because he had heard conflicting information about Complainant and Mr. Cross' workload and the security and safety assurance BEST groups were questioning the value of the function. (TR 313). Also, in 2000, Mr. Thomas had suggested changing the number of employees and the workload of that position, but had made little progress during his time as NRIA manager. (TR 313-314). As the nuclear security support function was being questioned prior to Complainant's protected activity, I find that Mr. Fisicaro's opinion of Complainant's work did not substantially change after he reported the rumors of security violations to Mr. Fisicaro in September of 2001.

Second, Complainant argues that Mr. Cash's perception of his work declined after his protected activity. Complainant points out that Mr. Cash rated Complainant as unsatisfactory in thirty-four of fifty-three skill areas on the Skills Assessment Matrix (CX 54) and he commented that "it might be hard to find the ideal candidate" within the company. (TR 766; CX 59). Initially it should be noted that Mr. Cash became Complainant's supervisor in October of 2001, one month after Complainant engaged in protected activity. Mr. Cash did not supervise Complainant before he became the NRIA manager, and thus his opinions of Complainant were based on his current work performance. (TR 418). Mr. Cash testified that he did not evaluate Complainant in February of 2002 with the Skills Assessment Matrix (CX 54), but rather he was testing the weights and scales of the draft Skills Assessment Matrix. (TR 350, 752-753). In fact, when Mr. Cash evaluated Complainant in June of 2002, the Skills Assessment Matrix was not used; instead, Complainant was evaluated based on the minimum and desired qualifications of the new position. Mr. Cash testified that his ratings of Complainant were based on his perception of whether Complainant could meet those qualifications. (TR 509; RX 17-18). I find that Mr. Cash's evaluation in June of 2002 does not demonstrate that his opinion of Complainant's work declined because this evaluation was based on Complainant's ability to perform the new position, not the old position. Further, Mr. Cash wanted to look outside of Duke for an individual for the new position because he did not think that anyone within Duke would have the type of nuclear security and engineering experience that he envisioned for the new position. (TR 469). While Mr. Cash's comment does suggest that he had a lowered opinion of Complainant, it was in the context of the new position, and was not a comment on Complainant's performance as a nuclear security specialist. In fact, Mr. Cash's overall rating of Complainant on the 2001 performance evaluation was "meets expectations," which was comparable to Complainant's 1999 and 2000 performance evaluations. (TR 481; CX 30-31; RX 67-68). Also, Mr. Cash's rating of "meets expectations" qualified Complainant for a lump sum raise, which he had also received in previous years. (TR 152-154, 457-458; RX 7).

Finally, Complainant argues that Mr. Cash changed his position in 2002 because Mr. Cash instructed him not to attend the security BEST meetings and to review the "value" of the "items of interest" e-mails. Mr. Cash testified that he asked Complainant to review the value of the "items of interest" e-mails because he reviewed the same articles from other sources and Complainant was not providing a summary of the articles. (TR 143-144, 554-556). Also, Mr. Cash instructed Complainant and Mr. Cross not to attend the security BEST meetings because he wanted to be able to discuss the new position with the security managers and he did not think it was appropriate for Complainant and Mr. Cross to be privy to those conversations. (TR 553-554). However, Complainant and Mr. Cross were allowed to attend the meetings if they had a specific issue to address with the security managers and Mr. Cash would bring information back for Complainant and Mr. Cross. (TR 146-147, 554). It is questionable whether Complainant's ability to do his job was limited by his exclusion from the security BEST meetings, as he asserts, because the NRIA task list indicates that Mr. Cross was responsible for attending the security BEST meetings. (CX 10-11).

Complainant has failed to present evidence that demonstrates that Respondent's perception of his work declined after he engaged in protected activity. Mr. Fiscaro wanted the nuclear security specialist position reviewed before Complainant's protected activity (and in fact Mr. Thomas recommended changing the position in 2000) and Complainant's 2001 performance evaluation was consistent with his performance evaluations in previous years. Moreover, Mr. Cash made minor changes to Complainant's position which did not substantially affect his ability to perform his job. I find that Respondent's perception of Complainant did not decline after his protected activity and thus was not a contributing factor in his termination.

#### 8. Human resources' involvement in the process does not remove bias

Complainant argues that human resources' involvement in the process does not demonstrate a lack of bias because Respondent did not have written procedures for reviewing job functions and Ms. Rabon was not aware of Complainant's job duties during the crafting of the new position. Ms. Rabon testified that her role in the process was to assist Mr. Cash in clearly defining the duties of the nuclear security support function and to help him understand the process of creating a new position. (TR 337-339, 749, 751-752). Ms. Rabon explained that it was a "judgment call" as to whether an existing position was modified or a new position was created. (TR 327-328). Ms. Rabon knew Complainant's general duties, but she was not aware of his day-to-day tasks. (TR 328-329). She testified that none of Duke's practices were violated during this process. (TR 765). Ms. Rabon's role in this process was to guide Mr. Cash in creating the new position. Ms. Rabon did not actively participate in the drafting of the new job description, and thus it is irrelevant that she did not know the day-to-day duties of Complainant. While Complainant argues that human resources' involvement was "insignificant" to the outcome, Ms. Rabon's actions, such as instructing Mr. Cash to look for internal candidates and recommending panel interviews, did keep Complainant as a viable candidate for the position. Moreover, I find Ms. Rabon's testimony that none of Duke's practices were violated during the process to be credible. I find that human resources'



involvement did add a level of objectivity to the process and thus Complainant has failed to show that its involvement contributed to his termination.

#### 9. Temporal proximity

Complainant argues that Complainant's job was in jeopardy less than six weeks after his protected activity because that is when the review of the nuclear security support function began. In contrast, Respondent argues that Complainant was terminated one year after he engaged in protected activity, which is too remote to infer that the protected activity was a contributory factor in his termination. A retaliatory motive may be inferred when the adverse action closely follows protected activity. *Kester*, slip op. at 10 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Keys v. Lutheran Family and Children's Services of Mo.*, 668 F.2d 356, 358 (8th Cir. 1981)). The lack of temporal proximity should be considered in determining whether the complainant has established causation, especially if a legitimate intervening basis for the adverse action exists. *Tracanna v. Arctic Slope Inspection Service*, 1997-WPC-1 (ARB July 31, 2001); *Evans v. Washington Public Power Supply System*, 1995-ERA-54 (ARB July 30, 1996).

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[Page 21]

Complainant engaged in protected activity on September 5, 2001. (TR 29; CX 1). In October of 2001, Mr. Fisicaro asked Mr. Cash and the security BEST group to review the nuclear security support function. (TR 304, 312, 424-425, 567-568, 721). Based on this review, Mr. Cash decided to craft a new position and ultimately Complainant was terminated because he was not selected for the new position. (TR 45, 128, 445, 557). If I were just to consider the timing of Complainant's protected activity and the initiation of the review that ultimately led to Complainant's termination, then an inference of causation could be raised. However, two intervening events occurred that sever the causal connection between Complainant's protected activity and his termination: the entrance of Mr. Cash as the new NRIA manager and the terrorist events of September 11, 2001.

First, Mr. Cash became the NRIA manager in October of 2001. (TR 418). Mr. Cash testified that when he enters a new position, he reviews the structure of the organization in order to maximize the value it adds to the company. (TR 425). Also, Mr. Fisicaro specifically asked him to review the nuclear security support function and to make recommendations as to how it could function better. (TR 425). Complainant has not presented evidence that rebuts Mr. Cash's testimony regarding the reasons that he reviewed the nuclear security support function. Mr. Cash's stated reasons for reviewing the nuclear security support function demonstrate that he and Mr. Fisicaro wanted this function to be "well-functioning" like emergency planning, not that they were seeking to eliminate Complainant's position. In fact, when Mr. Cash finished his review of the NRIA function in December of 2001, he retained Complainant and Mr. Cross in the Security Regulatory Program function (TR 427-428; RX 3), thus demonstrating that his review of the organization was to make it more efficient, not to eliminate employees. The fact that Complainant's position was subsequently changed, because of the needs of the

security and safety assurance managers and the events of September 11, 2001, does not demonstrate that his termination was due to his protected activity.

Second, Mr. Cash testified that after September 11, 2001, the nuclear industry "immediately started to question the structural integrity of our facilities and all our abilities to deal with terrorist issues. So we knew that that was going to be significant in terms of how the engineering, legislative, [and] regulatory environment would look like for nuclear power." (TR 442). Mr. Cash explained that because of these changes, he felt there was a strong need for the people working in nuclear security to have an engineering background, which was never an issue before September 11, 2001. (TR 443, 449). The job description specifically states that the new position was created because of the events of September 11, 2001. (RX 10, p. 2; *see also* RX 44). In contrast, Complainant believes that the events of September 11, 2001 were not a motivating factor for the review of the nuclear security support function because "all of the orders that were issued [by the NRC after September 11, 2001] were in areas where I have particular experience and expertise in what they were asking the sites to do, virtually every aspect. There were no orders that focused on activities that would've required a high level of engineering type analytical things." (TR 810). Duke made a legitimate business decision that it needed individuals with engineering experience in the nuclear security function in the aftermath of September 11, 2001. Complainant's opinion that the NRC orders were within the realm of his experience does not undermine Duke's business decision. Complainant has not presented evidence that Respondent's decision to create a new position was due to this protected activity. Therefore, I find that the entrance of Mr. Cash as the NRIA manager and the events of September 11, 2001 are intervening events that sever any causal connection between Complainant's protected activity and his termination.

#### 10. Complainant and Mr. Cross were treated identically throughout the process

Respondent argues that Complainant and Mr. Cross were treated identically throughout the process, negating any inference of discrimination. The Board has noted that lack of proof that the complainant was treated differently from other employees during a layoff supports a conclusion that the complainant's termination was not discriminatory. *Acord*, slip op. at 9, n.10. Complainant and Mr. Cross were the two nuclear security specialists in the general office. (TR 56). During the review of the nuclear security support function, Mr. Cash always met with Complainant and Mr. Cross at the same time and provided them with the same information. (TR 58, 62, 109, 317-319, 109, 451-452, 459, 513-514). Complainant and Mr. Cross were both allowed an opportunity to provide feedback on the draft job description, and both did provide feedback to Mr. Cash. (TR 59; CX 13; RX 6). After the new position was created and Messrs. Cash, King, and Thomas completed the incumbent evaluations, Complainant and Mr. Cross were to be considered for the new position, even if they did not apply, based on their status as incumbents. (TR 513-514). In fact, the interviewers evaluated Mr. Cross, even though he withdrew from consideration before the interview, because he was an incumbent. (RX 32-34). Neither Complainant nor Mr. Cross was selected for the new position, and both were laid off. (TR 128, 557). All of the evidence indicates that Complainant and Mr. Cross were treated identically throughout the process. I find that Duke's equal treatment of Complainant and Mr. Cross,

given that Complainant was the only one who engaged in protected activity, demonstrates that Complainant's reporting of alleged security violations to Mr. Fisicaro did not contribute to his termination.

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[Page 22]

After reviewing all of the evidence, I find that Complainant has failed to demonstrate that his protected activity was a contributory factor to his termination.

### RECOMMENDED ORDER

IT IS RECOMMENDED THAT the complaint of Terry W. Keener be DISMISSED.

DANIEL L. LELAND  
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such petitions for review must be received by the Administrative Review Board within ten (10) business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7 and 24.8.

### **[ENDNOTES]**

<sup>1</sup> The following abbreviations have been used in this decision and order: CX = Complainant's exhibit, RX = Respondent's exhibit, JX = joint exhibit, and TR = transcript of hearing.

<sup>2</sup> A copy of Complainant's complaint can be found at RX 72.

<sup>3</sup> A copy of OSHA's determination letter can be found at RX 73.

<sup>4</sup> The nuclear general office includes the nuclear assessment and issues division, which is managed by James Fisicaro. (TR 295-296; CX 44). The nuclear regulatory and industry affairs is a subgroup of the NAID. (TR 416). The NRIA provides regulatory support (in the areas of licensing, emergency planning, and quality assurance) to the three nuclear power plants operated by Duke. (TR 415). Complainant's position was in the NRIA.

<sup>5</sup> There are five salary bands that determine the level of compensation at Duke. According to Complainant, an individual's salary band is determined based on his/her current job function, qualifications, skill, experience, and job knowledge. (TR 54).

<sup>6</sup> This is a generic job description for employees with Complainant's level of experience and salary band. It is not specific to the technical specialist position. (TR 268).

<sup>7</sup> Mrs. Keener worked at McGuire as a security officer from 1985 to July 28, 2003. (TR 271-272).

<sup>8</sup> Mr. Evans replaced Complainant as security manager at McGuire in 1996. (TR 171). Mr. Evans transferred to the human resources department in June of 2003. (CX 57, p. 17).

<sup>9</sup> This incident will hereinafter be referred to as the "Evans shoe incident."

<sup>10</sup> Mr. Evans was Mrs. Keener's manager for six or seven years. (TR 278). Mrs. Keener never observed Mr. Evans give an instruction that conflicted with security procedures. (TR 279).

<sup>11</sup> Complainant testified that "a problem identification process, also referred to as a PIP, is Duke's methodology to document events that occur at a site or anywhere within the nuclear generation department... Although the PIP program, per se, is not required by the NRC, the NRC requires that utilities have a corrective action program. This is Duke's methodology for doing that." (TR 118). A majority of the events entered into the PIP program are not significant. (TR 200).

<sup>12</sup> Mr. Reid estimated that the Evans shoe incident occurred in 1999 or 2000. (TR 373-375). Mr. Reid also testified that no one asked him about the Evans shoe incident until May or June of 2003. (TR 372-373, 375).

<sup>13</sup> Mr. Dolan testified that he did not hear about the alleged safety violations that Complainant reported to Mr. Fisicaro until after Complainant was terminated. (CX 57, pp. 45, 76). Also, Patricia Cox, who was staff for the nuclear safety review board ("NSRB"), testified that the Evans shoe incident was never addressed at a NSRB meeting, even though it was the type of incident handled by the NSRB. (TR 399-400).

<sup>14</sup> Mr. Cash has been a Duke employee since 1985. (TR 408-409).

<sup>15</sup> Mr. Fisicaro selected Mr. Cash as the new NRIA manager. (TR 424, 563).

<sup>16</sup> Jeff Thomas was the NRIA manager in 2000. Mr. Fisicaro asked him whether two full-time equivalents were needed in the security support function. He performed a review and concluded that the security support function should be reduced to less than one full-time equivalent. (TR 677-678, 681; RX 63-64). Mr. Thomas met with the security BEST group in February of 2000, and they agreed that the security support function could be lessened. (TR 682). However, he made "little progress" on reducing the level of security support before he left the NRIA in April of 2001. (TR 682-683).

<sup>17</sup> As a result of his review, Mr. Cash divided the NRIA into three functional groups effective January 1, 2002. (TR 427-428, 565; RX 3).

<sup>18</sup> "BEST" stands for business excellence security team. (TR 146-147). Mr. Fisicaro is the chair of the nuclear safety review board and is a member of the safety assurance BEST group at Duke. (TR 299). The safety assurance BEST group is made up of the safety assurance managers from the three nuclear stations and Mr. Fisicaro. The security BEST group is made up of the security managers from the three nuclear stations and a general office representative. The security BEST group is a sub-group of the safety assurance BEST group. (TR 303).

<sup>19</sup> The Nuclear Energy Institute ("NEI") is a lobbying organization for the nuclear power industry and a coordination group with the Nuclear Regulatory Commission. (TR 438-439).

<sup>20</sup> Terry King is the nuclear security manager at Oconee Nuclear Station. (TR 718).

<sup>21</sup> Complainant testified that to his knowledge no other position was eliminated after Mr. Cash's review of the NRIA organization. (TR 808).

<sup>22</sup> During the process of creating the new position, Ms. Rabon knew in general the duties of Complainant and Mr. Cross, but she did not know their day-to-day tasks. Ms. Rabon was also aware of Complainant and Mr. Cross' work history and performance evaluations at Duke. (TR 328-335, 753-754; RX 49-50).

<sup>23</sup> Ms. Rabon drafted a document dated February 11, 2002 outlining the steps to creating a new position so that Mr. Cash would have a better understanding of the process. (TR 749, 751-752; RX 48). She testified that there are no written policies or procedures for reviewing a position or determining whether an existing position should be modified or a new position should be created, but rather it is a "judgment call." (TR 327-328).

<sup>24</sup> In the spring of 2002, Mr. Cash tested the weights and scale of the skills assessment matrix with Complainant and Mr. Cross; at that time, he was not formally evaluating Complainant and Mr. Cross with the skills assessment matrix. (TR 350, 752-753; CX 54).

<sup>25</sup> Complainant testified that this meeting occurred on February 7, 2002. (TR 58; CX 12).

<sup>26</sup> Mr. Cash concluded that one individual was sufficient for the new position based on the feedback from the safety assurance managers and the security managers. (TR 465).

<sup>27</sup> In fact, Complainant does not believe that the events of September 11, 2001 were the motivating factor in changing the nuclear security support function because Complainant had experience in the security areas that NRC targeted after September 11, 2001 and there was no explanation as to why the review was the result of the events of September 11, 2001. (TR 809-810, 814-815). Complainant acknowledged that he could not discuss the engineering analysis of NRC orders, but testified that engineering analysis was not part of the new position because none of the accountabilities required the individual to perform mathematical calculations. Rather, the individual in the new position would work with the engineers who performed the calculations. (TR 825-826, 835-836).

<sup>28</sup> The job description contains a list of six major accountabilities for the position along with minimum and desired qualifications. (CX 15).

<sup>29</sup> The security managers interacted with the industry working groups when Complainant worked in the general office. (TR 214-215). In the years that Complainant worked for the NRIA, he only attended two or three meetings with industry working groups. (TR 215). However, when Complainant worked as a security manager, he did have contact with industry working groups and outside agencies. (TR 258, 788-790, 822-823).

<sup>30</sup> Mr. Cash testified that human resources recommended adding a Bachelor of Science in Engineering or Physical Sciences as a desired qualification based on the salary band of the new position. (TR 496, 499; RX 15).

<sup>31</sup> Complainant never gave this document to Mr. Cash. (TR 236, 828).

<sup>32</sup> Mr. Cash completed Mr. Cross' annual performance evaluation in May of 2002. Mr. Cash's overall evaluation of Mr. Cross was that he "met expectations." (TR 485-486; RX 12).

<sup>33</sup> The candidate rating table includes the minimum and desired qualifications. Mr. Cash testified that he assigned different weights to the qualifications based upon which skills he thought were most important for the new position. (TR 493-494). The skills that had the most weight were: (1) ability to negotiate and coordinate between customer groups, (2) ability to write formal analytical documents, brief summaries, and presentations, (3) ability to communicate ideas to various levels of management and with the NRC, and (4) ability to read and interpret regulations, draft rulemakings, legislation and proposed or final statutes and summarize their affect on plant security and activities. (RX 14, p. 4).

<sup>34</sup> Mr. Cash testified that he did not assess Complainant and Mr. Cross in February of 2002, but rather was testing a draft version of the skills assessment matrix. (TR 671; CX 54).

<sup>35</sup> Messrs. Cash, King, and Thomas evaluated Complainant and Mr. Cross against the job description that included a Bachelor=s of Science in Engineering or Physical Science as a desired qualification. (TR 620-621). Complainant and Mr. Cross were not aware that a Bachelor=s of Science in Engineering or Physical Science was a desired qualification at the time of this evaluation. (TR 621). Mr. Cash did not give them a copy of the job description that included this desired qualification because it did not occur to him that they might want a copy. (TR 662).

<sup>36</sup> The ratings for Mr. Cross were: Mr. Cash rated Mr. Cross as 1.20 on minimum qualifications and 1.10 on desired qualifications; Mr. King rated Mr. Cross as 1.70 on minimum qualifications and 1.00 on desired qualifications; and Mr. Thomas rated Mr. Cross as 1.80 on minimum qualifications and 1.50 on desired qualifications. (RX 18-19, 56, 59).

<sup>37</sup> Mr. King never supervised Complainant or Mr. Cross. (TR 745). However, he did interact with Complainant and Mr. Cross because they provided support on the development of security procedures and directives. (TR 720).

<sup>38</sup> "JOBS" stands for Jobs Opportunity Broadcasting System. (TR 342).

<sup>39</sup> The job title for the new position on the JOBS bulletin was "Nuclear Security Regulatory Affairs Specialist." (RX 22). The job title was subsequently changed to "Nuclear Security Regulatory Affairs Manager." (RX 23).

<sup>40</sup> In fact, Mr. Cash wanted to look for candidates outside of Duke because he felt that they would not find anyone with experience within Duke, but Ms. Rabon told him that they had to look at internal candidates first. (TR 339, 352, 766-768; CX 59).

<sup>41</sup> At the time, Complainant and Mr. Thomas had a good relationship and he had no reason to think Mr. King disliked him. (TR 217). However, Complainant no longer considers Mr. Thomas to be a truthful person because Mr. Thomas testified at the hearing that he did not tell Complainant that Mr. Cash was not the person "driving" the review of the nuclear security support function. Mr. Thomas never stated that Mr. Fiscaro was the individual behind the review, but it was implied to Complainant. (TR 838-840). Mr. Thomas does not recall telling Complainant that Mr. Cash was not the person "driving" the review of the nuclear security support function. (TR 713-714).

<sup>42</sup> Complainant had never heard of panel interviews being done at Duke. He testified that typically the hiring manager would be the only person to interview the candidates. (TR 126-127).

<sup>43</sup> Mr. Boies and Mr. Wadsworth were also interviewed on August 30, 2002. Mr. Story was interviewed on September 6, 2002. (TR 759-760; RX 53-54). Mr. Story was only interviewed by Messrs. Cash and Thomas because Mr. King had to address an issue at Oconee Nuclear Station on September 6, 2002. (TR 523, 636-637, 731).

<sup>44</sup> Ms. Rabon asked the interviewers to rank Mr. Cross, even though he was not interviewed, because he was an incumbent. (TR 349, 527, 696, 763).

<sup>45</sup> Ms. Rabon also testified that Mr. Boies was not on a performance improvement plan at the time of his interview. (TR 341). She testified that an employee on a performance improvement plan is not allowed to apply for another job through the JOBS bulletin. (TR 342).

<sup>46</sup> In fact, Mr. Thomas' final rating of Complainant's skills was based on the interview and his previous work experience with him, as Mr. Thomas felt that Complainant could have performed better in his interview. (TR 695; RX 71).

<sup>47</sup> William Byers, security manager at Catawba Nuclear Station, hired a "class" of security officers, approximately eleven, in late 2002. He testified that no one asked him if



there was a position available for Complainant, but he would have been qualified to work as a security officer. (CX 56, pp. 36-38).

<sup>48</sup> Mr. Causey is a longtime friend of Complainant's wife. (TR 284).

<sup>49</sup> Complainant testified that he is also under stress because his wife was terminated from Duke and this litigation itself is stressful. (TR 235-236).

<sup>50</sup> At the hearing, Complainant testified that he is not alleging that Mr. Fisicaro told Mr. Cash about the rumors that he reported in September of 2001. (TR 208).

<sup>51</sup> Mr. King testified that typically a position is only posted on the JOBS bulletin if it is "significantly changed." (TR 745).